Supreme Court, U.S.
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03-1148

In the

Supreme Court of the United States

JAMES A. MCCOWN,

Petitioner,

v.

ST. JOHN'S HEALTH SYSTEM, INC.; SISTERS OF MERCY HEALTH SYSTEM; LLOYD SOLAR; WILLIAM SYLER; ROBERT HAMMONS; PAUL ELMORE; JOHN SWOPE; ROBERT NORTON; and ST. JOHN'S REGIONAL HEALTH CENTER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether proof of homosexual desire of the harasser is necessary for a victim of same-sex sexual harassment to survive the harasser's summary judgment motion.

2. Whether proof of a mixed-sex workplace is necessary for a victim of same-sex sexual harassment to survive the harasser's summary judgment motion.

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OPINIONS BELOW

The opinion of the Federal District Court for the Western District of Missouri, Southern Division (App. 9-28) is not published. The opinion of the Eighth Circuit Court of Appeals (App. 1-8) is reported at 349 F.3d 540.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSITUTIONAL STATUTES AND PROVISIONS INVOLVED

US CODE--TITLE 42 Sec. 2000e-16b is reproduced in the appendix at page 56a.

STATEMENT

In this case, the lower courts applied the law set out by this Court in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) in a manner that resulted in an increased burden on McCown at the summary judgment stage of the case, that resulted in the granting of St. John's motion for summary judgment, that resulted in depriving McCown of his right to have his case heard by a jury.

Appellant McCown was employed by St. John's Regional Health Center ("SJRHC") from October 1994

through April 1, 2001. During his employment, McCown was sexually assaulted by his immediate supervisor, Lloyd Soller ("Soller") on numerous occasions from about October 1999 until July 2000. Many of Soller's assaults involved Soller grabbing McCown's waist, chest, and buttocks, or simulating anal intercourse by grinding his crotch against McCown's anus and jabbing McCown's anus with the handle of a shovel. Some of these assaults were accompanied by sexually suggestive comments made by Soller toward McCown.

These assaults left McCown feeling embarrassed, humiliated, and distracted from his work. Some of McCown's co-workers were witnesses to Soller's assaults on McCown. These assaults were traumatizing to McCown, and caused him to have negative feelings about his job and himself, for which he sought some counseling. McCown told Soller to stop touching him and to leave him alone, but the harassment continued.

In an attempt to comply with SJRHC's sexual harassment policy, McCown reported Soller's assaults to William Syler, who was one of Soller's supervisors. When Soller's harassment continued, McCown reported the assaults to Robert Hammons, who was another of Soller's supervisors. When Soller's harassment continued, McCown contacted the EEOC and Missouri Commission on Human Rights, filing a formal complaint.

Once SJRHC received notice of McCown's formal complaint with the EEOC and MCHR, a brief investigation was done by William Syler, the results of

which were subsequently destroyed. SJRHC removed McCown from his position with the projects shop, isolating him from his co-workers so that Soller was no longer his immediate supervisor. McCown was then directed by William Syler and Robert Hammons to do jobs in contradicting ways, to repeat jobs, and to re-do jobs. McCown felt that Syler and Hammons were trying to drive him out of his position with SJRHC.

On April 1, 2001, McCown finally resigned his employment due to intolerable working conditions. McCown then obtained a right to sue letter and instigated the present action. McCown brought claims against the individual supervisors he reported to, Soller, Sisters of Mercy, and St. John's Health System for sexual harassment under Title VII and the Missouri Human Rights Act. McCown later amended his claim to correctly name SJRHC.

Defendants brought a motion for summary judgment before the Magistrate. At that time, the Magistrate granted SJRHC's motion for summary judgment on McCown's Title VII and MHRA claim, because it found there was no genuine issue of material fact that McCown suffered discrimination "because of sex," which is an "essential element of a same-sex harassment cause of action." At that time, the Magistrate also granted SJRHC's motion for summary judgment on McCown's disparate treatment claim, because it found that McCown failed to establish that there were any similarly situated females in his workplace and that any females received more favorable treatment than he did.

McCown appealed the entry of summary judgment on the Title VII and MHRA claims with regard to SJRHC. After oral argument, the appeals court affirmed the Magistrate's granting of SJRHC's motion for summary judgment, following the Magistrate's reasoning in granting SJRHC's original motion for summary judgment.

STATEMENT OF FACTS

A. McCown is hired by SJRHC.

McCown was hired by the projects shop at SJRHC in 1998 as a general construction laborer, in the projects shop on the health center's Springfield, Missouri, campus. McCown's immediate supervisor in the projects shop was Lloyd Soller, until October 2000 when McCown was removed from Soller's supervision. McCown did demolition, repair, construction, and renovation.

At the time McCown worked in the projects shop, there were both men and women employed by SJRHC in that shop, although men worked primarily outside the offices, while women worked in secretarial capacities in the offices. Thus, Appellant contends that the projects shop was a mixed-gender work force. SJRHC also employed a sexual harassment policy while McCown was employed in the projects shop. In addition to reviewing literature relating to SJRHC's sexual harassment policy, McCown attended an initial orientation seminar provided to all new employees at SJRHC.

B. Soller sexually harasses McCown continually.

McCown worked under the direct supervision of Soller in the projects shop. During the course of McCown's employment with SJRHC, Soller sexually assaulted and harassed McCown by grabbing his buttocks, and Soller grinding his genitals against McCown's buttocks and anus in simulated homosexual intercourse. Soller also sexually harassed McCown by Soller telling him to "squeal like a pig, or a woman," and by Soller attempting to stick handles of a shovel and tape measure in McCown's anus. Soller's sexual assaults were sporadic and unprovoked.

1. The beginning of Soller's harassment.

In October 1999, Soller grabbed McCown's waist and chest from behind on several occasions, while making comments such as "hey, little piggy," and "hey, sweetie, what kind of work are you going to do today?" In November 1999, Soller grabbed McCown by his waist and chest and told numerous sexual jokes around McCown, on multiple occasions. In December of 1999, McCown noticed Soller touching and grabbing him more frequently, and would not stop his activity. At this time, McCown began documenting Soller's behavior in a journal.

2. McCown documents Soller's harassment.

Throughout January 2000, Soller grabbed McCown by his waist and buttocks. In one instance of grabbing McCown, Soller told McCown to "squeal like a

pig," and on a separate instance made pig noises. McCown repeatedly asked Soller to stop his behavior, and on time Soller laughed at McCown when asked to stop.

Throughout February 2000, Soller continued to grab McCown by his waist and buttocks, including grinding his genitals against McCown's buttocks and anus in simulated homosexual intercourse. In March 2000, Soller again grabbed McCown by his waist, this time telling McCown to "squeal like a pig, or a woman."

Also during March 2000, Soller attempted to stick the handle of a shovel in his anus, and McCown threatened to complain to William Syler. Soller laughed and retorted to McCown, "yeah, right," and told McCown that if he needed his job he would not complain. Days later, McCown complained to Syler. Soller's harassment continued throughout March, including Soller grabbing McCown's waist and slapping his buttocks.

3. Despite McCown's verbal complaints, more harassment.

Throughout April and May of 2000, Soller grabbed McCown's waist several times, in addition to instigating an intensifying pattern of sexual assaults on McCown. On numerous occasions Soller attempted to stick the end of a tape measure in McCown's anus, despite McCown's continued verbal objections.

Later, Soller again grabbed McCown's waist and proceeded grinding his genitals against McCown's buttocks and anus. Upon McCown's verbal objection,

Soller asked, "what are you going to do?" On another occasion, when McCown's car ran out of gas on his way to work, Soller asked him "don't you know how to suck?" Soller went on to say he had heard McCown was good at sucking and he should have sucked some gas for his car. A few days later, Soller kicked McCown in his buttocks.

In June 2000, Soller poked the end of a tape measure in McCown's crotch and commented, "I got your 4-to-6 inches right here." The next day, McCown made a verbal complaint about this behavior to Robert Hammons. Upon not seeing any action, McCown later complained to Paul Elmore and Jon Swope. Dissatisfied that his complaints were being properly investigated by SJRHC, McCown filed a formal complaint with the EEOC and Missouri Commission on Human Rights on October 4, 2000.

C. SJRHC fails to adequately investigate McCown's claim of sexual harassment.

McCown verbally reported to SJRHC these instances of sexual assault and sexual harassment by Soller. When McCown complained to William Syler of Soller's behavior, Syler told McCown that he would "take care of it" and get back to him. Syler never did take care of the harassment, nor get back to McCown about the complaint. McCown later verbally reported to SJRHC these continued instances of sexual assault and sexual harassment by Soller by notifying Robert Hammons. After McCown's notice, Hammons told McCown to "deal with it," and if he didn't like it to "find a new job." After McCown's verbal reports, Soller's harassing behavior continued. McCown then verbally

reported Soller's behavior to Paul Elmore and Jon Swope, who told McCown they could not make Soller "be nice." The day after his meeting with Elmore and Swope, McCown filed a formal complaint with the EEOC and the Missouri Commission on Human Rights. Upon receiving notice of McCown's formal complaint, SJRHC conducted a brief investigation of McCown's claims concerning Soller's behavior. William Syler testified that the findings of the investigation were subsequently destroyed by accident, and are not available to be reviewed. There is no way to confirm what SJRHC's investigation consisted of, nor what the exact findings were.

SJRHC eventually determined that Soller had behaved inappropriately toward McCown, and removed McCown from Soller's supervision. Remedial action taken against Soller consisted of Soller being given a "first warning," and having McCown removed from his supervision. Soller testified that the "first warning" went off his personnel records after one year. McCown was directed to report to Syler and Hammons, instead of Soller, and was given duties separate from his co-workers in the projects shop.

D. McCown is constructively discharged.

As a result of being removed from his job with his co-workers in the projects shop, McCown was often asked to do jobs in solitude. Additionally, because he was supervised by both Syler and Hammons, McCown was frequently given contradicting job orders, either intentionally or inadvertently. McCown was directed to paint the stairwells of a portion of the hospital from its basement to its top floor, and when finished to start

the same project over again. Syler and Hammons sometimes directed projects shop employees to oversee McCown's painting work, although not to assist McCown. McCown eventually found his employment at SJRHC to be unbearable, and resigned his employment on April 1, 2001.

As a result of the harassment and assaults, and the retaliation McCown suffered at the hands of SJRHC, McCown suffered mental anguish, humiliation, and counseling expenses and future counseling needs.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because sexual harassment cases (especially same-sex sexual harassment cases) are based largely upon factual scenarios and, by granting summary judgment because harassment was not believed to be "based upon sex," a trial judge can – and in this case does – preclude victims of same-sex sexual harassment from having their day in court. This case presents two issues on which the Court's guidance is needed, both of which surround determining whether same-sex sexual harassment is "based upon sex."

The Court provided some help to litigants in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1985). However, lower courts are interpreting this Court's rulings hyper-strictly – as in this case – which leaves victims of this harassment with the courthouse doors shut in their proverbial faces, barred

by the summary judgment rulings of trial courts across this country.

On two specific issues, the lower courts denied Appellant McCown his day in court in this case.

First, the lower courts found that there was insufficient evidence that the harassment suffered by McCown was "based upon sex" due to the lack of evidence that McCown's harasser, Lloyd Soller, was motivated by sexual desire.

Second, the lower courts found that there was insufficient evidence that the harassment suffered by McCown was "based upon sex" due to the lack of evidence that McCown worked in a mixed-sex workplace.

These lower court holdings are not common to this case, but they are unfairly requiring victims of same-sex sexual harassment to meet hyper-strict burdens that are not required to be met by mixed-sex sexual harassment victims, and are impossible for most same-sex sexual harassment victims to meet. This is an increasingly important question of federal law that should be clarified by this Court.

1. The Court should grant certiorari to clarify whether proof of homosexual desire of the harasser is necessary for a victim of same-sex sexual harassment to establish the existence of genuine issues of material fact and survive the harasser's summary judgment motion.

"Offensive sexual touching is actionable discrimination even in a same-sex workforce." *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1067 (9th Cir. 2002). Discrimination because of sex can occur "where some men are subjected to offensive sexual touching and some men are not." *Id.*, citing *Oncale*, at 81. The court in *Quick* specifically held that the harasser's motives were a question of fact in part because the assault was to the plaintiff's sexual organs. *Quick*, at 1379.

Moreover, courts have long understood that male-to-female sexual harassment may take the form of actual or simulated sexual assaults in an attempt to humiliate and degrade the victim. See Hillary S. Axam & Deborah Salesne, Simulated Sodomy and Other Forms of Heterosexual "Horseplay:" Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After *Oncale*, 11 Yale J.L. & Feminism 155, 173-74 (1999). Indeed, a single incident of sexual contact such as grabbing a woman's breast may be a violation of Title VII. *Fall v. Indiana University Board of Trustees*, 12 F.Supp.2d 870, 879-80 (N.D.Ind. 1998) (finding liability for a single action involving a kiss and grabbing of the victim's breast, which caused the victim such distress that she

vomited immediately afterwards).[1] "Such harassment – grabbing, poking, rubbing or mouthing areas of the body linked to sexuality – is inescapably 'because of ...sex.'" *Rene*, 305 F.3d at 1065-66 (collecting cases discussing physical sexual assault as violating Title VII).

In this case, the lower courts were presented these facts:

McCown had his buttocks grabbed; had Soller grind his genitals against McCown's buttocks and anus in simulated homosexual intercourse; was told to "squeal like a pig, or a woman;" and had Soller attempt to stick handles of a shovel and tape measure in McCown's anus. (App. pp. 30-34)

From these facts, a fact finder could conclude that Soller's harassment was based on sex. *Oncale*, at 80-81; *Quick*, at 1378. All inferences are to be drawn in McCown's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *see also Newton v. Caldwell Laboratories*, 156 F.3d 880, 881 (8th Cir. 1998). McCown submits that the very fact that Soller repeatedly assaulted his buttocks and anus creates a genuine issue

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[1] The *Fall* court analyzed federal case law on this issue, noting that many courts have found a single sexual assault is sufficient to create a hostile environment. *Fall*, 12 F.Supp.2d at 879-80. The Fall court further considered the impact of *Oncale*, as well as EEOC guidelines which "presume that the unwelcome, intentional touching of a charging party's intimate body parts is sufficiently offensive to alter the conditions of her employment and constitute a violation of Title VII." *Id.* at 879 (quoting EEOC Policy Guidance on Sexual Harassment, 8 Fair Emp. Prac. Man. (BNA) 405:6691 (March 19, 1990)).

of fact as to whether Soller's harassment was "based on sex." Thus, the Magistrate's conclusion that there was no evidence to create an issue of fact as to whether Soller's assaults were based on sex was in error.

Furthermore, the facts alleged by McCown in the case at hand are similar to the facts in four (4) cases cited by the Magistrate in its Order granting summary judgment for the defendants in *Schmedding v. Tnemeck Co., Inc.*, 187 F.3d 862 (8th Cir. 1999); *Fry v. Holmes Freight Lines, Inc.*, 72 F.Supp.2d 1074 (W.D. Mo. 1999); *Breitenfeldt v. Long Prairie Packing Co., Inc.*, 48 F.Supp.2d 1170 (D.Minn. 1999), and *Quick*. Although citing these cases in its Order granting defendant's motion for summary judgment, the Magistrate failed to acknowledge the similarities in the facts of both of those cases with the case at hand. In *Quick*, the plaintiff was subjected to verbal harassment, and actions aimed at his testicles. These are similar to the facts alleged by McCown. (App. pp. 30-34). In *Schmedding*, the plaintiff was patted on the buttocks, as similarly alleged by McCown. (App. pp. 30-34). In *Fry*, the plaintiff was subjected to simulated intercourse, as similarly alleged by McCown. (App. pp. 30-34). In *Breitenfeldt*, the plaintiff was subjected to simulated anal sex, forcing and rubbing rods between his legs, and was asked about his sexual practices. Again, these are facts alleged by McCown in the case before this Court. (App. pp. 30-34).

Even if the Court were to determine that the reasoning in *Oncale* and *Meritor* are to be followed by the lower courts in determining whether to grant defendant's motion for summary judgment against plaintiff, the lower courts in this case incorrectly

applied the reasoning set-out by this Court, in that the lower courts required McCown to prove that Soller acted out of sexual desire for McCown.

2. The Court should grant certiorari to clarify whether proof of a mixed-sex workplace is necessary for a victim of same-sex sexual harassment to harassment to establish the existence of genuine issues of material fact and survive the harasser's summary judgment motion.

As recognized in *Oncale*, a sexual harassment plaintiff may demonstrate that the harassment at issue was based on sex by setting forth "direct, comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Oncale*, at 80-81; *see also Quick*, at 1378 ("Evidence that members of one sex were the primary targets of the harassment is sufficient to show that the conduct was gender based for purposes of summary judgment.") The key inquiry is whether "*members of one sex are exposed to disadvantageous terms or conditions of employment of which members of the other sex are not exposed.*" *Quick*, at 1378, *citing Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (Ginsburg J., concurring)(emphasis added).

McCown was repeatedly subjected to assaults on his buttocks and anus by Soller, in addition to other harassing gestures. (App. pp. 30-34) SJRHC's female employees were not. (App. p. 30) The SJRHC projects shop where McCown and Soller worked *was* a mixed-sex workplace, in that both women and men worked in the same building. (App. p. 30) The Magistrate

references that McCown's affidavit states, "that women also worked in the projects shop, he acknowledged that the women primarily worked in the offices." (App. p. 30) Whether or not these women in the projects shop create a mixed-sex workplace is not an issue to be decided by the Magistrate, but, rather, by a trier of fact. In fact, the Magistrate heard no evidence about the exact role of women in McCown's workplace, but only acknowledges that McCown testifies that there *were* women in the workplace. Thus, the Magistrate makes the exact point McCown is trying to make, and is required to make: that McCown had female co-workers in the projects shop offices.

The Magistrate further cites that McCown "admits in his affidavit that he had no knowledge regarding whether Soller ever sexually harassed women." (App. p. 22) Again, the Magistrate makes the exact point McCown is trying to make, and is required to make: there is no evidence that Soller ever harassed the female employees of SJRHC, only the males. (App. p. 30) As a matter of law, the fact that females were not targeted in the same manner raises an inference that the harassment was based on sex sufficient to defeat a motion for summary judgment. *Oncale*, at 80-81; *Quick*, at 1378. Thus, the Magistrate erred as a matter of law in concluding that there was no genuine issue of material fact with respect to whether Soller's assaults were "based on sex."

In coming to its conclusion that there was no genuine issue of fact, the Magistrate references the Eighth Circuit Court of Appeals' analysis of *Quick v. Donaldson Co., Inc.*, 90 F.3d 1378 (8th Cir. 1996). In *Quick*, the plaintiff filed suit against his employer for

sexual harassment and physical assault when he was "bagged" numerous times by male co-workers (meaning his testicles were assaulted). In reversing the district court's grant of summary judgment, the Eighth Circuit Court of Appeals concluded that:

> [The] record contains only incidents of bagging male employees. A female employee was apparently once asked to bag a male supervisor, but she refused. On this record, with all the facts and inferences drawn in Quick's favor, a fact-finder could reasonably conclude that the treatment of men at Donaldson was worse than the treatment of women.

Quick, at 1379. Notably, the Court in *Quick* made no determination of how much sexual conduct was required before to conduct became "based on sex" – this is an issue for the trier of fact.

McCown submits that the same conclusion should be drawn in this case. The record contains only evidence of Soller sexually assaulting men (McCown). (App. pp. 30-34) It is undisputed that Soller never harassed or assaulted women in the same fashion as McCown. (App. p. 30) There is no evidence Soller ever harassed a female co-worker or subordinate. (App. p. 30) As such, McCown has presented evidence that Soller's harassment was based on sex.

The Magistrate's only apparent attempt to distinguish *Quick* from this case is in the facts surrounding the harassment each plaintiff was subjected to. In *Quick*, the plaintiff was subjected to

"bagging," or intentionally grabbing and squeezing of one's testicles, as well as verbal harassment, and being labeled a homosexual through name calling. (App. pp. 16-17). In the case at hand, Soller subjected McCown to grabbing, sexually suggestive remarks, and sexual touching; (App. pp. 30-34) in addition to having his waist and chest grabbed; having a tape measure poked in his crotch while Soller said, "I got your 4-to-6 inches right here;" and being taunted when McCown made complaints about it to Soller, by statements such as if he needed his job he would not complain. (App. pp. 30-34).

The Magistrate went on to acknowledge that McCown is not required to explain his harasser's motivation for his harassing behavior, although cites that McCown believed that Soller was trying to irritate him, and explained in deposition that "that's just how Lloyd [Soller] was." (App. pp. 50) Not knowing enough about his harasser's sexual orientation to comment, McCown had also stated during deposition testimony that he did not know why Soller was harassing him. (App. pp. 43, 50) Evidently, the Magistrate concluded that this lack of "absence of proof that Soller is a homosexual" necessarily meant that there was no genuine issue of material fact.

The U.S. Supreme Court and the Eighth Circuit have repeatedly held that a plaintiff need only to show that one gender was treated differently than the other to maintain a sex harassment claim under Title VII. *Oncale*, at 80-81; *Quick*, at 1378. There is no additional burden of demonstrating that sexual assaults be accompanied by derogatory remarks about one's gender in order to make a case of sexual harassment.

cite. McCown has demonstrated the sexual nature of the assaults Soller subjected him to, and has, therefore, demonstrated that there is a genuine issue of material fact that he suffered discrimination because of sex.

Nor, as the Magistrate suggests, does Title VII prohibit claims where the harassment be directed at numerous employees of the same gender. Indeed, discrimination because of sex can occur "where some men are subjected to offensive sexual touching and some men are not." *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1067 (9th Cir. 2002), *citing Oncale*, at 81. Obviously, the vast majority of sex harassment claims are brought by individual plaintiffs who allege that the harassment was directed solely towards them. The Magistrate erred in determining that "[t]he fact that Soller did not harass all the male co-workers is one factor in concluding that there is lack of evidence that he was acting on the basis of discrimination against men." And, in fact, no legal basis is cited for the Magistrate's determination.

McCown presented evidence that he (a man) was subject to disadvantageous working conditions (Soller's repeated assaults), which women at the SJRHC projects shop were not. (App. pp. 30-34) As a matter of law, this evidence creates a fact question as to whether the conduct was "based on sex." *Quick*, at 1378 ("Evidence that members of one sex were the primary targets of the harassment is sufficient to show that the conduct was gender based for purposes of summary judgment.") As such, summary judgment was improper.

Even if the Court were to determine that the reasoning in *Oncale* and *Meritor* are to be followed by the lower courts in determining whether to grant defendant's motion for summary judgment against plaintiff, the lower courts in this case incorrectly applied the reasoning set-out by this Court, in that the lower courts required McCown to prove that Soller had not sexually harassed women in the SJRHC workplace.

CONCLUSION

Granting the Petition would afford this Court an opportunity to speak on two important issues concerning the burden of proof by plaintiffs in the summary judgment stage of same-sex sexual harassment cases, on which the lower courts are applying hyper-strict burdens that are not in sync with this Court's holdings in *Oncale v.* ***Sundowner Offshore Services, Inc.,*** 523 U.S. 75 (1998), and *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1985).

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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(Any footnotes trail end of each document)

No. 03-1478

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

James A. McCown,
Plaintiff-Appellant,

v.

St. John's Health System, Inc.; Sisters of Mercy Health System; Lloyd Solar; William Syler; Robert Hammons; Paul Elmore; John Swope; Robert Norton; St. John's Regional Health Center
Defendant-Appellee.

September 11, 2003, Submitted
November 12, 2003, Filed

COUNSEL: For James A. Mccown, Plaintiff - Appellant: Tina G. Fowler, LATHROP & GAGE, Springfield, MO. Jeffrey M. Merrell, MERRELL & LONG, Forsyth, MO. Dianna Coy Long, Columbia, MO.

For St. John Health System, Inc., Sisters of Mercy Health System, Lloyd Solar, William Syler, Robert Hammons, Paul Elmore, John Swope, Robert Norton, St. John's Regional Health Center, Defendants - Appellees: Frank M. Evans, III, Tina G. Fowler, LATHROP & GAGE, Springfield, MO.

JUDGES: Before MELLOY, RICHARD S. ARNOLD, and FAGG, Circuit Judges.

OPINION BY: MELLOY

OPINION: MELLOY, Circuit Judge.

James Christopher McCown ("McCown") appeals the district court's n1 entry of summary judgment in favor of St. John's Regional Health Center ("St. John's") on sexual harassment claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2000), and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.010, et seq. (2000). We affirm.

I. Background

McCown was employed by St. John's as a general construction worker from October 1994 until April 2001. Until October 2000, McCown worked in the projects shop, under the direct supervision of Lloyd Soller n2 ("Soller"). During this time period, Soller subjected McCown to inappropriate conduct on multiple occasions including: grabbing McCown by the waist, chest and buttocks; grinding his genitals against McCown's buttocks in simulated intercourse; telling McCown to "squeal like a pig, or a woman," and making other lewd comments; attempting to stick the handle of a shovel and a tape measure in McCown's anus; and kicking McCown in the buttocks. Initially, McCown thought that Soller was kidding. Although McCown did not understand what motivated Soller's behavior, he speculated that Soller was trying to "irritate" him because "that's just how Lloyd was." McCown repeatedly asked Soller to stop, but Soller continued to engage in this offensive behavior.

While both male and female employees worked in the projects shop with McCown and Soller, the women primarily worked in the office while the men performed physical labor in various other locations. Soller, however, only supervised the men. There is no evidence in the record that Soller ever sexually harassed any of the women in the projects shop.

McCown reported Soller's inappropriate behavior to Soller's supervisors on three different occasions. Dissatisfied with their response, McCown formally filed a complaint with the EEOC and the Missouri Commission on Human Rights. Eventually, Soller's supervisors conducted an internal investigation and removed McCown from Soller's supervision while giving Soller a disciplinary warning. McCown worked in seclusion from the other employees in the projects shop and was placed under the supervision of two managers. As a result, McCown often received contradictory job orders. Frustrated by his new working conditions, McCown resigned from St. John's in April 2001.

McCown filed suit against St. John's alleging same-sex sexual harassment, disparate treatment because of gender, retaliation, and constructive discharge in violation of Title VII and the Missouri Human Rights Act. The district court granted summary judgment on each claim. Presently, McCown appeals solely on the sexual harassment claim and argues that the district court erred in determining that he failed to state an actionable claim because he could not demonstrate that Soller's conduct was based on sex.

II. Analysis

We review a grant of summary judgment de novo. Quick v. Donaldson Co., 90 F.3d 1372, 1376 (8th Cir. 1996). A party is entitled to judgment as a matter of law only if it can show that no genuine issue of material fact exists. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is to be granted where the evidence is such that no reasonable jury could return a verdict for the non-moving party. Anderson, 477 U.S. at 248. The evidence must be viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor. Id. at 255; Calder v. TCI Cablevision of Missouri, Inc., 298 F.3d 723, 728 (8th Cir. 2002).

"Title VII prohibits 'an employer' from discriminating 'against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex.'" Quick, 90 F.3d at 1377 (quoting 42 U.S.C. § 2000e-2(a)(1)) . Discrimination based on sex which creates a hostile or abusive working environment violates Title VII. Id. To state a claim for sexual discrimination based on a hostile work environment under Title VII, a plaintiff must show: (1) he belongs to a protected group; (2) he was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) his employer knew or should have known of the harassment and failed to take proper remedial action. Id. (citations omitted). The third element, whether Soller's harassment was based on sex, is the single issue on appeal.

Same-sex harassment claims differ from those between males and females because the latter "typically involve[] explicit or implicit proposals of sexual activity," which create a presumption that the underlying conduct was based on sex. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998). However, this presumption is applicable only if there is credible evidence to show that the alleged harasser is sexually attracted to the plaintiff. Id. Consequently, without this presumption, a same-sex harassment plaintiff needs other methods to prove that the conduct was based on sex. Id.

Oncale, the leading Supreme Court case on same-sex harassment claims, sets forth three evidentiary routes by which a same-sex plaintiff can show that the conduct was based on sex. Id. at 80-81. First, a plaintiff can show that the conduct was motivated by sexual desire . Id. at 80. Second, a plaintiff can show that the harasser was motivated by a general hostility to the presence of the same gender in the workplace. Id. And third, a plaintiff may offer direct comparative evidence about how the harasser treated both males and females in a mixed-sex workplace. 523 U.S. at 80-81; see also Elmahdi v. Marriott Hotel Servs., Inc., 339 F.3d 645, 655 (8th Cir. 2003) (in determining whether discrimination was based on sex, the plaintiff is required to prove the harasser's comments were motivated either by sexual desire, special attention to plaintiff as a male, or that harasser treated males and females differently in a mixed gender environment). Oncale also emphasizes that "whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely

tinged with offensive sexual connotations, but actually constituted '*discrimina*[*tion*] . . . because of . . . sex.'" Oncale, 523 U.S. at 81 (emphasis and alteration in original) (quoting 42 U.S.C. § 2000e-2(a)(1)).

There is no evidence in the record to demonstrate that Soller was homosexual and motivated by sexual desire toward McCown. Nor is there evidence that Soller was motivated by a general hostility to the presence of males in the workplace. Instead, according to McCown, it appears that Soller was just trying to "irritate" him because "that's just how Lloyd was." Additionally, we have previously found that crude gender-specific vulgarity is not, by itself, probative of gender discrimination. See Linville v. Sears, Roebuck & Co., 335 F.3d 822, 824 (8th Cir. 2003) (per curiam) (finding that employer's backhanding plaintiff in the scrotum and laughing "was probative of crude, gender-specific vulgarity [but] . . . was not, by itself, probative of gender discrimination"). Thus, we must consider whether McCown can offer direct comparative evidence of how Soller treated males and females in a mixed-sex workplace to determine if Soller's conduct was based on sex.

The key inquiry under Title VII is "'whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" Oncale, 523 U.S. at 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993) (Ginsburg, J., concurring)). In other words, Title VII does not prohibit workplace harassment unless it is based on sex. In this case, there is no evidence to demonstrate that the area of the projects shop in which McCown

worked was a mixed-sex workplace. The only evidence before us is an affidavit by McCown stating that the "workplace consisted of both men and women, although women worked primarily in the offices." The record indicates that Soller only supervised the men who worked outside the office area of the projects shop in which the women worked. The record is silent as to the amount of interaction that Soller had with the women in the office area of the projects shop.

Even if the projects shop did qualify as a mixed-sex workplace, the only evidence of Soller's treatment towards women is found in McCown's affidavit which states McCown never knew of Soller sexually harassing female employees in the workplace. McCown's express absence of knowledge is not sufficient to generate a jury question as to whether Soller's conduct constituted "discrimination . . . because of . . . sex." 42 U.S.C. § 2000e-2(a)(1).

Although Soller's conduct was inappropriate and vulgar, there is insufficient evidence to demonstrate that Soller's conduct towards McCown was based on sex.

Accordingly, we affirm.

Footnotes

n1 The Honorable James C. England, United States Magistrate Judge for the Western District of Missouri, presiding by consent of the parties under 28 U.S.C.A. § 636(c)(1).

n2 Soller's name is spelled incorrectly in the district court's caption of the case and appears as "Solar."

Civil Action No. 01-3327-CV-3-JCE

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JAMES A. MCCOWN,
Plaintiff,

v.

ST. JOHN'S HEALTH SYSTEM, INC., SISTERS OF MERCY HEALTH SYSTEM, ST. JOHN'S REGIONAL HEALTH CENTER, LLOYD SOLAR, WILLIAM SYLER, ROBERT HAMMONS, PAUL ELMORE, JOHN SWOPE, and ROBERT NORTON, CENTER, et al.,
Defendants.

January 21, 2003, Filed

ORDER

Plaintiff has filed a two-count complaint alleging that he has been a victim of sexual harassment in violation of Title VII, 42 U.S.C. § 2000e et sec. and the Missouri Human Rights Act ["MHRA"]. Specifically, he alleges that his supervisor, Lloyd Soller, caused him to suffer sexual harassment at defendants' workplace, and that he was retaliated against and constructively discharged as a result. In his amended complaint, plaintiff has alleged disparate treatment because of gender.

Defendants have moved for summary judgment in this action. Defendants assert that they are entitled to

summary judgment because plaintiff's claim of sexual harassment is insufficient as a matter of law. It is defendants' position that plaintiff cannot show that any alleged harassment was because of sex, and that he cannot show that defendants failed to take proper remedial action. Defendants also contend that plaintiff's alleged retaliation claim must fail as a matter of law because he failed to exhaust administrative remedies regarding any alleged retaliation claim, and further, that even if the Court finds that he did exhaust administrative remedies, he cannot establish that he suffered a materially adverse employment action. They assert, further, that he cannot establish that he was subject to a constructive discharge. Additionally, defendants assert that with reference to the separate defendants Soller, Syler, Hammons, Elmore, Swope and North, his complaint fails as a matter of law because they are not employers within the meaning of Title VII or the MRHA and cannot be held individually liable, and that he failed to exhaust administrative remedies regarding these defendants. With reference to separate defendants Sisters and SJHS, defendants assert that these defendants were not plaintiff's employers within the meaning of Title VII or MRHA, and that he has failed to exhaust administrative remedies regarding them.

In regard to plaintiff's amended complaint, defendants assert that plaintiff has failed to make a prima facie showing that their actions were based on illegal discrimination by showing either the disparate treatment of plaintiff compared to a similarly situated co-worker, or an illegal discriminatory reason for their actions. Defendants assert that plaintiff cannot show that he suffered illegal discrimination on the basis of

sex nor that they took adverse action against him. Additionally, defendants contend that plaintiff cannot show that he was treated differently from similarly situated females because no similarly situated females existed.

Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ruling on motions for summary judgment, the Court must give the nonmoving party all reasonable inferences that can be drawn from the underlying facts. Fischer v. NWA, Inc., 883 F.2d 594, 598-99 (8th Cir. 1989), cert. denied, 495 U. S. 947 (1990). The nonmoving party must, however, resist a summary judgment motion by setting forth specific facts that show there is a genuine issue of fact for trial. Fed. R. Civ. P. 56(e); Burst v. Coors, 650 F.2d 930, 932 (8th Cir. 1981). The motion may then be granted only if there is no substantial evidence in support of that party's position.

In the employment context, it is recognized that for a variety of reasons, "courts have shown an increasing willingness to make use of the tool of summary judgment in discrimination cases . . . ." Nancy Gertner, United States District Court Judge, Changing Times: Summary Judgment and Employment Law, (1996 Annual Convention Manual of the National Employment Lawyers Association). The Eighth Circuit has stated that, although "summary judgment should seldom be granted in employment discrimination cases," Crawford v. Runyon, 37 F.3d 574, 586-87 (8th Cir. 1994), summary judgment is proper when a

plaintiff fails to establish a factual dispute on an essential element of his case. See Bialas v. Greyhound Lines, Inc., 59 F.3d 759, 762 (8th Cir. 1995).

To establish a prima facie case that he was subjected to a hostile work environment based on sexual harassment, plaintiff must show that: 1) he is a member of a protected group; 2) unwelcome harassment occurred; 3) the harassment was based on sex; 4) the harassment affected a term or condition of his employment; and 5) the employer knew or should have known of the harassment and failed to take prompt and effective remedial action. Carter v. Chrysler Corp., 173 F.3d 693, 700 (8th Cir. 1999); Schmedding v. Tnemeck Co., Inc., 187 F.3d 862, 864 (8th Cir. 1999). In evaluating plaintiff's claim, the totality of the circumstances must be considered, including the frequency and severity of the alleged harassing conduct, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). If a plaintiff establishes that a supervisor with authority over him created a hostile work environment, he maybe able to hold the employer vicariously liable. Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2292-93 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2270 (1998).

Discussion

Sexual Harassment Claim.

The parties do not appear to disagree regarding the basic facts of this case, which are primarily set forth in

Defendants' Suggestions in Support of Their Motion for Summary Judgment. Essentially, plaintiff contends that he was subjected to sexual harassment by his supervisor, Lloyd Soller, when he was employed by defendants in the projects shop. In October of 1999, he began having problems with Soller. It is his contention that Soller "began a pattern of grabbing and making sexually suggestive remarks to [plaintiff] ... making comments about plaintiff's genitals and actually grabbing plaintiff from behind and simulating homosexual intercourse." [Exhibit B, p. 33]. He also contends that Soller told crude jokes and made crude comments to plaintiff and others, that he was degrading to him and others, and that Soller frequently flexed his authority. When asked why Soller was doing these things, plaintiff stated that he did not know, that he didn't know if it was because he was a male, and he didn't know if Soller was sexually aroused by plaintiff or was trying to arouse him. It was his statement that besides Soller trying to irritate him, he did not know what his motivation was. He contends that he complained about the harassment, and was retaliated against by being criticized for his job performance and being given demeaning job assignments. Eventually, he asserts that he was constructively discharged.

In an affidavit submitted by plaintiff in response to defendants' motion for summary judgment, he asserts that there were men and women in the workplace, although he admits that the women were mainly working in the office. He states that he never saw Soller sexually harass any women employees, nor did he have knowledge that he had ever done so. He also stated that he did witness Soller sexually harass some of his other male co-workers. Plaintiff mentioned

incidents beginning about October of 1999 and continuing until the end of June of 2000. Specifically, he mentioned that Soller grabbed him by the waist and chest from behind and made comments such as "hey, little piggy," and "hey, sweetie, what kind of work you going to do today?" [Exhibit A, p. 2]. He stated that by the end of December of 1999, Soller was touching him and grabbing him more frequently, and was telling more dirty jokes around him. Plaintiff stated that Soller grabbed his buttocks, grabbed him by the waist and told him to "squeal like a pig," on two occasions, and grabbed him by the waist and made pig noises, and would not stop. Rather, Soller laughed when plaintiff told him to stop. He stated that Soller grabbed him by the waist in February and began grinding his genitals against his buttocks and anus, and on other occasions in February, grabbed him by the waist. It was his statement that in March, Soller attempted to stick the handle of a shovel in his anus, and when plaintiff told him to stop, Soller replied that if he needed his job, he would not complain to anyone about it. He stated that in March, Soller grabbed him by the waist and then slapped him on the buttocks with his hand; in April he attempted to stick the end of a tape measure in plaintiff's anus on two occasions and continued to grab him by the waist. In May, plaintiff stated that Soller again grabbed him by the waist and began grinding his genitals into his buttocks while he was cleaning a shower, and also kicked him in the buttocks while he was working on some tile. Plaintiff stated that in May, he ran out of gas on the way to work, and Soller asked him if he didn't know how to suck, because he had heard he was good at it. Plaintiff complained about an incident in June when he was digging a hole with four other employees and one said they needed to dig deeper,

about another 4-6 inches. When Soller overheard them, plaintiff stated that he shoved the end of his tape measure in plaintiff's crotch and said, "I've got your 4-to-6 inches right here." [Exh. A. at 6].

In support of their summary judgment motion, defendants point to Soller's admissions that he would occasionally pat plaintiff on the back, that he put a tape measure between his legs in the knee area on one occasion, and that he sometimes told jokes of a sexual nature. They assert that such actions are "horseplay," "juvenile," and commonplace in some circles. Defendants assert that while the environment in which plaintiff worked may have been unfriendly and unprofessional, he has failed to state a Title VII claim because he has failed to establish that the treatment was harassment against him because of sex. To be cognizable, they contend that there must be some other evidence, such as whether the perpetrator is married, a homosexual, sexually attracted to the plaintiff, or motivated by sexual desire in his actions. Because Soller is married, denied that he ever grabbed plaintiff in a sexual manner, and only admitted to shaking a tape measure between plaintiff's legs, at knee level, to get him to jump, defendants contend that plaintiff has not produced evidence to support his claim. They also rely on plaintiff's testimony that he didn't know why Soller was acting the way he did, didn't know if he was sexually aroused or trying to arouse plaintiff, and did not know if his actions were based on plaintiff's gender. Additionally, they assert that Swope testified that other men with whom he worked, including plaintiff, stated that they didn't think Soller was attracted to them or was homosexual, but rather, that he was just being inappropriate and trying to irritate them.

As defendants assert, in this case the tantamount issue before the Court is whether there is a genuine material issue existing regarding whether the harassment that plaintiff alleges was based on sex. Courts have emphasized that workplace harassment is not automatically discriminatory if the words or actions have sexual content or connotations, but rather, the conduct must actually constitute discrimination because of the individual's sex. E.g., Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998); Scusa v. Nestle U.S.A. Co., Inc., 181 F.3d 958, 965 (8th Cir. 1999); Quick v. Donaldson Company, Inc., 90 F.3d 1372 (8th Cir. 1996).

In Quick, the Eighth Circuit held that same sex sexual harassment claims are cognizable under Title VII, and that the harassment must be based on the plaintiff's sex. Id. at 1378. In Quick, about 85% of the workforce was male, and the Court of Appeals found that there was a genuine issue regarding whether the alleged harassment was gender based because it could be reasonably concluded from the record that the male employees were treated worse than the female employees. Quick, 90 F.3d at 1379. "The proper inquiry for determining whether discrimination was based on sex is whether `members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" Quick, at 1378, quoting Harris v. Forklift System, Inc., 510 U.S. 17 (1993). The behavior complained about in Quick included at least 100 occasions of "bagging," described as intentionally grabbing and squeezing another person's testicles; an assault where plaintiff was attacked by two co-workers and his testicle was brutally squeezed; verbal harassment; and being

labeled a homosexual through name calling, having tags placed on his equipment, and having "queer" written on his identification card. The Eighth Circuit found that the district court erred in concluding that the harassment was not gender based, but rather, was based on "personal enmity or hooliganism." Id. at 1379. Based on the fact that the record only contained incidents of bagging male employees, the Court found that a fact-finder could reasonably conclude that men were treated worse than women, and therefore, that plaintiff had raised a genuine issue of material fact regarding whether the alleged harassment was gender based. Id.

In Oncale, the Supreme Court, in recognizing same-sex harassment, made clear that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." 523 U.S. at 80. Rather, sex-specific and derogatory terms in a same-sex harassment case may be found if "the harasser is motivated by general hostility to the presence of [the same sex] in the workplace." Id. Additionally, a same-sex harassment plaintiff may offer "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." Id. at 80-81. The Court emphasized that, as in other Title VII cases, the conduct must be severe and pervasive to create a hostile work environment, and "so objectively offensive as to alter the `conditions' of the victim's employment." Id. at 81. Accordingly, "male-on-male horseplay" must not be mistaken for discrimination because of sex. Id. Further, the Court reiterated that the harassment should be judged based on the totality of the circumstances, and the "inquiry requires careful consideration of the social context in

which particular behavior occurs and is experienced by the target." Id. The Court, for example, pointed out the difference between a professional football player's working environment, and that of an office secretary. In insuring that Title VII is not transformed into a "general civility code" for the workplace, the Court summarized that courts and juries should consider the:

"surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abuse." Id. at 81-82.

Plaintiff primarily relies on Shepherd v. Slater Steels Corp., 168 F.3d 998 (7t" Cir. 1999), to support his contention that Soller's actions constituted discrimination on the basis of sex. He asserts that there is a factual issue regarding whether the harassment was motivated by some type of sexual desire, and that plaintiff does not necessarily have to establish that the harasser was an actual homosexual to create an issue on this. Plaintiff relies on Shepherd for the proposition that Soller's connotations of sexual interest in him suggest that he might be sexually oriented toward members of the same sex, and leaves ample room for the inference that Soller harassed plaintiff because he is a man. Depending on the context of the harassment, if there is room for the inference that the "sexual overlay was not incidental-that the harasser was genuinely

soliciting sex from the plaintiff or was otherwise directing harassment at the plaintiff because of the plaintiff's sex-then the task of deciding whether the harassment amounts to sex discrimination will fall to the finder of fact." Shepherd, 168 F.3d at 1010-011.

Plaintiff distinguishes Johnson v. Hondo, Inc., 125 F.3d 408 (7t" Cir. 1997), the primary decision relied on by defendants, stating that that decision does not stand for the proposition that sexual conduct could never give rise to an inference that the conduct was based on the victim's sex. In Johnson, the 7th Circuit held that vulgar provocations, which have no causal relationship to the plaintiff's gender as a male, will not alone raise a material issue regarding the sex-based character of the harassment. 125 F.3d at 413.

The courts, with no bright line rule, have attemped to distinguish cases of actual sexual harassment from the occasional vulgarity and sexual innuendo of coarse or boorish workers. In an effort not to confuse distasteful or inappropriate words and actions with deeply offensive and sexually harassing behavior, courts have recognized that sexually suggestive horseplay and locker-room type behavior does not necessarily invoke the protection of Title VII. The treatment meted out must have created a hostile work environment because plaintiff was singled out because he was a male, and the treatment must have been so severe as to alter the conditions of his employment in a significant way. See Mentor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1985). The Courts have focused on the context in which the harassment occurs, the objective severity of the harassment, the intensity and frequency of the harassment, the sexual content of the behavior, and

whether there is a "relentless sexual tenor to the harassment," Shepherd, 168 F.3d at 1011, to determine if a plaintiff has established that the harassment was because of sex. Vulgar methods of antagonizing a plaintiff, horseplay, crudeness, even sexual explicit conduct do not necessarily lead to the inevitable inference that the harasser acted because of the plaintiff's sex.

Although there is a paucity of Eighth Circuit law on the issue of same-sex harassment, district court cases from the Eighth Circuit provide guidance for how the Court should proceed in this case. In Fry v. Holmes Freight Lines, Inc., 72 F. Supp.2d 1074, 1078-79 (W.D.Mo. 1999), summary judgment for a dockworker was denied on the grounds that "persistent sexual propositions, epithets, and offensive touching engaged in by [plaintiff's] co-workers suggest that one or all of them may be oriented toward members of the same sex." The Court emphasized that the plaintiff did not have to prove that his harassers were homosexual, nor did he have to investigate their sexual history to withstand summary judgment, an argument made by defendants in this case. In Fry, however, the Court denied summary judgment because it found that plaintiff presented credible evidence that the harassers were homosexual. "If the conduct directed at [plaintiff] allows the inference that [he] was harassed because he is a man, then those acts constitute `credible evidence that the harasser is homosexual.'" Id. at 1077. Evidence relied upon by the Court in Fry included a co-worker kissing plaintiff on the neck on a regular basis; throwing him on the ground and attempting to grab his genitals approximately once a month; grabbing him by the waist and pounding him on the buttocks in simulation of

intercourse; another co-worker asking him once a month if he would "suck his dick," or "take it in the ass"; attempting to sit on his lap once a week; regularly pinching or patting his buttocks; commenting on his nice ass; and referring to plaintiff as "Sally. He's everybody's bitch." Id. at 1076-77. Viewing the facts most favorable to the plaintiff, the Court found there was a genuine issue for trial regarding whether plaintiff was discriminated against because he was a man.

In Breitenfeldt v. Long Prairie Packing Co., Inc., 48 F. Supp.2d 1170, 1172-73 (D.Minn. 1999), the plaintiff, who worked in a meat packing plant, was subjected to simulation of anal and oral sex, physical restraints by whole groups of co-workers, and painful physical assault on his genitalia. This included forcing and rubbing a rod used to sharpen knives between his legs, being held down by groups of men, sometimes in a bin of raw meat or a trough of blood, and being subjected to simulated sex acts, being called a fag, and being asked about his sexual practice. The plaintiff alleged that this behavior occurred on nearly a daily basis, and that other male employees were also subjected to the behavior. The Court found that it was not fatal to plaintiff's case that the did not know why his co-workers and one supervisor were acting this way toward him, another argument defendants assert in this case. It held, however, that "a reasonable fact finder could conclude from the sexually explicit quality of the verbal and physical assaults, especially the frequent references to homosexual acts, that Plaintiff's gender was one motivating factor of the offensive behavior." Id. at 1176. Recognizing that Title VII is not a "general civility code," it found that the facts presented in the light most favorable to plaintiff, "could support a

fording that Plaintiff was exposed to a sexually hostile work environment because of his sex, a work environment so beyond the pale, so beyond the bounds of decency and propriety, that it could be actionable under Title VII." Id.

In this case, having carefully reviewed the evidence in the light most favorable to plaintiff, the Court finds that he has failed to raise a genuine issue of material fact as to whether Soller harassed him because of his gender. Based on applicable case law, the totality of the circumstances, and the context in which the behavior occurred, the Court finds that plaintiff has failed to establish that he was discriminated against because of sex. While Soller taunted him and used vulgar words, accompanied sometimes by sexually-suggestive gestures, the Court believes that plaintiff has failed to establish a genuine issue for trial regarding whether the actions, taken as a whole, in the context in which they occurred, were because plaintiff was a male.

Although he stated in his affidavit that women also worked in the projects shop, he acknowledged that the women primarily worked in the offices. He admits in his affidavit that he had no knowledge regarding whether Soller ever sexually harassed women. Nothing in his affidavit nor his testimony as a whole suggests that his fellow co-workers in the shop were other than males, and he admits that some, but not all of them, were subjected to some of the same kind of treatment that he endured. The fact that Soller did not harass all the male co-workers is one factor in concluding that there is a lack of evidence that he was acting on the basis of discrimination against men.

Additionally, while the absence of proof that Soller is a homosexual does not defeat plaintiff's claim, the fact that there is no evidence that Soller was acting out of homosexual tendencies is one factor to consider in determining whether he was harassing plaintiff on the basis of sex.

Although the law does not require plaintiff to explain the harasser's motivation in acting towards him in such a manner, in this case plaintiff did testify that he believed Soller's desire was mainly to irritate him. [Plaintiff's Deposition, p. 55]. He testified that Soller told crude jokes and grabbed other co-workers, although not everyone, and "that's just how Lloyd was." [Depo., p. 52]. In summary, plaintiff complained about Soller touching him and making obscene sexual innuendos, telling crude jokes, making vulgar comments, degrading him and others, and flexing his authority. Granted that Soller's actions were unprofessional, obnoxious, vulgar, and even reprehensible, the Court cannot say that plaintiff has established that he acted the way he did because of plaintiff's gender. It cannot be said that Soller's actions, while rude and crude, were so objectively offensive that they went "beyond the pale, so beyond the bounds of decency and propriety, that [they] could be actionable under Title VII." Breitenfeldt, 48 F. Supp.2d at 1172-73. Accordingly, the Court finds that plaintiff has failed to raise a genuine issue of material fact that he has suffered discrimination because of sex. Because he has failed to establish this essential element of a same-sex harassment cause of action, defendants' motion for summary judgment must be granted.

Disparate Treatment.

In his amended complaint, plaintiff alleges that he was treated differently than similarly situated female employees and was subjected to disparate treatment because of gender. It is his contention that similarly situated female employees were not subjected to the sexual comments and touchings to which he was subjected.

It is defendants' position that they are entitled to summary judgment on this claim because plaintiff cannot make a prima facie showing that the alleged actions were based on illegal discrimination with an intent to discriminate, or that there was disparate treatment of plaintiff when compared to a similarly situated co-worker. Mann v. Frank, 795 F. Supp. 1438 (W.D.Mo. 1992)(citations omitted). It is their position that there is no evidence to demonstrate harassment or discrimination on the basis of sex and no evidence of adverse employment action by defendants. The Court has previously ruled that there were no genuine issues for trial on the sexual harassment claim. As more fully explained in this opinion, plaintiff has failed to demonstrate that he suffered any adverse employment action. Further, defendants assert that plaintiff cannot show that he was treated differently from similarly situated females. Based on the record before the Court in this case, plaintiff has failed to show that any similarly situated females exist. According to his affidavit, the project shops females worked in the offices, and he has no knowledge that Soller sexually harassed any females. Because plaintiff has failed to establish that similarly situated females received more

favorable treatment than he did, summary judgment must be granted on his disparate treatment claim.

Retaliation Claim.

Plaintiff asserts that after he brought the alleged harassment to the attention of management, he was retaliated against. Specifically, he complains that he was given demeaning jobs, that he didn't think the supervisors knew what they were doing in their painting assignments, and that he was separated from working with some of his co-workers. He admits that he was removed from working with Soller, and that he had no change in his hours, pay, or benefits.

To establish a claim of retaliation, an employee must show that he filed a harassment claim, his employer subsequently took an adverse employment action against him, and the action was causally linked to his protected activity. Scusa v. Nestle U.S.A. Company, Inc., 181 F.3d 958 (8th Cir. 1999). Defendants assert that plaintiff failed to allege retaliation in his charge of discrimination, and that he has therefore failed to exhaust his administrative remedies with reference to any retaliation claim. It is plaintiff's position that the retaliation did not occur until after he filed his claim with the EEOC.

Assuming for the sake of argument, that the retaliation claim is properly before the Court, it will be the finding of the undersigned that plaintiff has failed to establish that he was retaliated against for complaining about the alleged harassment. It is his assertion that he was criticized in his job performance, given negative evaluations, and given demeaning and harassing job

assignments. The Court fords, however, after fully reviewing the specifics of plaintiff's complaints and applicable case law, that none of these acts, even assuming their truth and a causal relationship, rise to the level of adverse employment actions under the law. While plaintiff mainly complains about his different job duties and the fact that he was separated from some people with whom he'd previously worked, there is nothing about his complaints that suggest that adverse action was taken against him in retaliation for his sexual harassment complaints, or that the changes in duties had a tangible, legally cognizable effect on his employment. Accordingly, defendants are entitled to summary judgment on plaintiff's retaliation claim.

Constructive Discharge Claim

Plaintiff also claims that he was constructively discharged from his employment. Constructive discharge occurs when an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job. Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 574 (8t" Cir. 1997). Plaintiff claims that he was forced to resign because of unlawful, sexually motivated, and discriminatory treatment. Based on the ruling herein regarding plaintiff's sexual harassment claim, and based on the record as a whole, there is no evidence to suggest that plaintiff's working conditions were so intolerable that he was forced to quit his job.

Plaintiff's Claims against separate defendants.

Plaintiff has named Soller, Syler, Hammons, Elmore, Swope, and Norton as separate defendants in this case.

Under the law in the Eighth Circuit, co-workers and supervisors cannot be held individually liable under Title VII or the MRHA. Lenhardt v. Basic Institute of Technology, Inc., 55 F.3d 377, 380 (8th Cir. 1995); Spencer v. Ripley County State Bank, 123 F.3d 690, 691-92 (8th Cir. 1997). Accordingly, plaintiff's claims against the separate defendants have no legal basis and should be dismissed.

Plaintiff's Claims against Sisters and SJHS.

Plaintiff has also named Sisters of Mercy Health System ["Sisters"] and St. John's Health System ["SJHS"] as defendants in this case. It is defendants' position that the only proper defendant should have been St. John's Regional Health Center ["SJRHC"], plaintiff's admitted employer and the entity named by plaintiff in his charge to the EEOC and the Missouri Commission on Human Rights. Plaintiff has amended his complaint to name SJRHC as the correct party. Accordingly, no further action is necessary on this issue. Conclusion

The Court has carefully considered the totality of the circumstances in this case, and finds that plaintiff has failed to establish a genuine factual dispute for trial. On plaintiff's claim of sexual harassment, the Court finds that there are no material factual disputes and that the claim is appropriate for summary judgment. On his disparate treatment claim, summary judgment is appropriate because he has failed to raise any genuine issues for trial. On his claims of retaliation and constructive discharge, plaintiff has failed to establish that he suffered any adverse employment action and those claims fail as a matter of law.

Accordingly, it is

ORDERED that defendants' motion for summary judgment be, and it is hereby, granted.

/s/ James C. England
JAMES C. ENGLAND
United States Magistrate

Date: 1/21/03

Case No. 01-3327-CV-S-AE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JAMES C. McCOWN,
Plaintiff,

v.

ST. JOHN'S HEALTH SYSTEM, SISTERS OF MERCY HEALTH SYSTEM, LLOYD SOLAR, WILLIAM SYLER, ROBERT HAMMONS, PAUL ELMORE, JOHN SWOPE, and ROBERT NORTON,
Defendants.

AFFIDAVIT OF PLAINTIFF JAMES CHRISTOPHER McCOWN

STATE OF MISSOURI)
) ss.
COUNTY OF TANEY)

I, James Christopher McCown, Plaintiff herin, being duly sworn, says:

1. I am above the age of eighteen (18) years and in all ways competent to make this affidavit.

2. I am plaintiff in the above styled case in this court.

3. I was employed by St. Johns and, specifically, worked under the direct supervision of Lloyd Soller for

approximately two (2) year, ending in the fall of 2000, when my immediate supervisor was changed.

4. Under the supervision of Lloyd Soller, I worked as part of a team of employees in "projects" doing various construction projects for St. Johns.

5. Our workplace consisted of both men and women although the women worked primarily in the offices of our "projects" shop.

6. Although there were women in our workplace, I never saw Lloyd Soller sexually harass any women employees, not do I have any knowledge that Soller ever sexually harassed these women.

7. I was personally, sexually harassed by Lloyd Soller, however, and I witnessed Soller sexually harass some of my other male co-workers.

8. Around October 1999, I recall Soller grabbing my waist and chest from behind me on several different occasions while I was in the shop. He made comments to me such as. "hey, little piggy" and "hey, sweetie, what kind of work you going to do today?"

9. Around early November 1999, I had taken time off work to bow hunt for deer, and before I left Soller asked me if I was going to find myself. When I returned from my vacation, Soller grabbed my waist and chest and told dirty jokes on several occasions.

10. Around the end of December 1999, I noticed Soller was touching me and grabbing me more frequently, and started telling more dirty jokes around

me. I began to document the incidents at this time, because Soller was getting way too "friendly" and he would not stop.

11. On or about January 3, 2000, Soller grabbed my buttocks from behind me while I worked in the Cancer Building. I told him I did not like it and to stop. Soller laughed.

12. On or about January 7, 2000, Soller grabbed my body from behind while I worked. I again told him to stop.

13. On or about January 17, 2000, Soller grabbed me by my waist and told me to "squeal like a pig." I was so embarrassed by this that I had to leave the area where I had been working.

14. On or about January 31, 2000, Soller again grabbed me by my waist.

15. On or about February 1, 2000, Soller grabbed me by my waist and made pig noises.

16. On or about February 4, 2000, Soller grabbed me by my waist from behind and began grinding his genitals against my buttocks and anus while was working. I told him to stop.

17. On or about February 10, 2000, Soller grabbed my buttocks from behind me while I was bent over cleaning the shop.

18. On or about February 15, 2000, Soller grabbed me by my waist, and I told him to stop.

19. On or about February 21, 2000, Soller again grabbed my waist and I told him to stop.

20. On or about February 25, 2000, Soller grabbed me by my waist while I was working in Audio/Video, and I told him to stop.

21. On or about February 29, 2000, Swhile I was working in the Emergency Room I noticed Soller had a tape measure in his hand, and I stopped working. Soller asked me why I stopped working and I told him that because he was standing behind me, I didn't trust him. Soller laughed.

22. On or about March 8, 2000, Soller grabbed me by my waist and told me to "squeal like a pig, or a woman."

23. On or about March 9, 2000, Soller attempted to stick the handle of a shovel in my anus while I was working in GNE. I told him to stop, or I would talk to Bill Syler about it. Soller laughed and said, "yeah right," and told me if I needed my job I would not complain.

24. On or about March 14, 2000, about five (5) other and I met with Bill Syler. We discussed Soller's behavior and other concerns. Concerning Soller's sexual harassment of the male employees, Syler told us that Soller has had this problem before, ant that he would "take care of it" and get back to us about the problem.

Three of the other employees at this meeting were Lannie Ingram, Chad Monneyham, and Ali Ibrahim.

25. On or about March 20, 2000, Soller grabbed me by my waist and then slapped me on my buttocks with his hand.

26. On or about April 4, 2000, Soller attempted to stick the end of a tape measure in my anus. I told him to stop.

27. On or about April 18, 2000, Soller grabbed me by my waist.

28. On or about April 21, 2000, Soller grabbed me by my waist two (2) more times.

29. On or about April 24, 2000, Soller attamped to stick the end of a tape measure in my anus while I was hanging blinds in the MAC Building with another employee. I told him to stop and to get away from me.

30. On or about April 26, 2000, Soller attempted to stick the end of a tape measure in my anus while I was working at Heatlhtracks with another employee. I slapped the tape measure away and told him to stop.

31. On or about May 5, 2000, Soller grabbed me by my waist and began grinding his genitals against my buttocks and anus while I was cleaning the men's shower at the Hammons Building with another employee. I pushed Soller away and asked, "why can you leave me alone?" Soller laughed and asked me, "what are you going to do?"

32. On or about May 11, 2000, I ran out of gas on my way to work. When I arrived at work, Soller asked me "don't you know how to suck?" I asked him what he

meant by that, and he said he had heard that I was good at it and I should have sucked some gas out. I got angry at these comments and left the room.

33. On or about May 17, 2000, Soller kicked me in my buttocks while I was working outside on some tile with another employee.

34. On or about June 28, 2000, four (4) other employees and I were digging a hole on East Kearny Street when one of us commented that we needed to dig deeper, "about another 4-to-6 inches." Soller overheard this and said, "I got your 4-to-6 inches right here," as he shoved the end of his tape measure in my crotch. Soller then did the same to another employee. I told Soller that "I could have gone all day" without him doing that. Soller laughed.

35. On or about June 19, 2000, I had a meeting with Bob Hammons, at which time I informed him of Soller continuing to touch and grab me, as well as other male employees. I told Hammons about the incident with the tapes measure the day before, and asked him to do something about it. Hammons' response was "oh, Chris, you're just mad about being wrote up and put on probation" (the result of a separate, earlier incident),

I denied that I was mad, and pointed out that Hammons has known that this problem with Soller had been going on for nearly one year. Hammons blamed Soller's behavior on the fact that we work construction and that things like Soller's activity was always going to occur. Hammons told me to "deal with it." When I asked Hammons "What would happen if I was a girl?" he responded that Soller would be fired, but that I was

not a woman, and if I did not like it, I should "find a new job."

I told Hammons that other employees and I had gone to Syler and told him about Soller's harassment. Hammons denied knowing this. I told Hammons that I knew that another employee who was at the meeting with Syler had already told Hammons about the meeting. I complained to Hammons that nothing had been done by Syler about the meeting we had with him.

36. ON or about October 3, 2000, about four (4) other employees and I met with Paul Elmore, of Human Resources, about our complaints against Soller, including the sexual harassment by Soller. Jon Swope, Chief Operating Officer at St. Johns, was also at that meeting. My complaints about Soller were heard, and Swope responded, starting that he could not "make him be nice."

I left the meeting angry because my impression was that neither Swope, nor Elmore were going to take action to stop Soller's sexual harassment of me and other male employees.

37. I filed my complaint with the EEOC and the Missouri Commission on Human Rights on or about October 4, 2000

38. I suffered an injury soon after filing my complaint and had to miss several weeks of work, followed by light duty work.

39. Upon returning to regular duty, I was required to work in seclusion from other employees in the

"projects" shop. I was told to report to Bob Hammons or Robert Norton or Bill Syler for work. I was then ordered to paint the stairwells from the basement to the top floor. Once that painting was done, I was told that I would "start over again."

40. I worked for several more weeks before I finally became disgusted with being treated differently that I quit St. Johns.

41. I feel that the individually named defendants should have helped me resolve my sexual harassment complaints against Lloyd Soller, but they failed to do so. Only after I filed my complaint with the EEOC and MCHR did they take any action, and then I was segregated from the rest of the "projects" shop work crews. I feel like they failed me in their official capacities as employees and supervisors of St. Johns. Therefore, I believe they should be defendants in their respective official capacities.

Further affiant sayeth not.

James C. McCOWN, Plaintiff

STATE OF MISSOURI)
) ss.
COUNTY OF TANEY)

I hereby certify that on the 12th day of November 2002, personally appeared before me James C. McCown, who being by me personally sworn, declared that he is the person who signed the foregoing document, and that

the statement therein contained are true and accurate according to his best knowledge and belief.

/s/
Notary Public

My Commission Expries 10/26/05

MARLA HARRIS
Taney County
My Commission Expires
October 28, 2005

Case No. 01-3327-CV-S-AE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHER DIVISION

JAMES C. McCOWN,
Plaintiff,

v.

ST. JOHNS HEALTH SYSTEM, SISTERS OF MERCY HEALTH SYSTEM, LLOYD SOLAR, WILLIAM SYLER, ROBERT HAMMONS, PAUL ELMORE, JOHN SWOPE, and ROBERT NORTON,
Defendants

THE DEPOSITION OF JAMES McCOWN,

produced, sworn, and examined on Friday, August 30, 2002, at 9:00 a.m. of that day, pursuant to Federal Rules of Civil Procedure and Notice to Take Deposition at the Law Offices of Merrell & Long, P.C., 16215 U.S. Highway 160, in the city of Forsyth, County of Taney, State of Missouri, before Melissa Kay Hannah, CSR, CCR and Notary Public, in a certain cause now pending in United States District Court, for the Western District of Missouri, Southern Division, wherein the parties are as above set forth; taken on behalf of the Defendants.

APPEARANCES

For Plaintiff: MR. JEFFREY M. MERRELL
Merrell & Long, P.C.
P.O. Box 1036
16215 U.S. Highway 160
Forsyth, MO 65653

For Defendants: MS. TINA G. FOWLER
Lathrop & Gage, L.C.
P.O. Box 5288
Springfield, MO 65808-4288

Also Present: Mr. Robert Norton
Mr. Paul Elmore

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Witness: JAMES C. McCOWN

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EXHIBITS

DEFENDANTS' EXHIBITS	DESCRIPTION	IDENTIFIED
1	Staff Combined Job Description And Performance Evaluation Form	94

(Original Defendants' Exhibit Nos. 1 is attached to the original transcript, and a copy is attached to each copy of the transcript.)

Phonetic spelling: (ph.)
Exactly as stated: (sic)

JAMES C. MCCOWN,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION

BY MS. FOWLER:

Q Please state your name for the record.

A James Christopher McCown.

Q And do you go by Chris?

A Yes, ma'am.

Q Chris, my name is Tina Fowler, and we met a few weeks ago at the depositions -- other depositions in this case. And as you know, I represent St. John's and the other defendants named in this case.

And today I -- I'm here just to really ask you some questions and find out more about the claims that you have against the named defendants.

Have you ever given your deposition before?

A No.

Q As you notice when you sat in on the other depositions, the court reporter's going to be taking down your responses. So, please, try to make a verbal response to her, yes or no. If you have any questions at any time or if you don't understand a question that I ask you, please ask me and I'll gladly repeat it.

Also, if you want to take a break at any time or, you know, need something to drink, just let me know, and I'll be happy to stop the deposition.

Is there any reason that you can't answer the questions today truthfully? Are you on any kind of medications or anything like that at this time?

A No.

Q Have you been on any medications in the last week?

A No.

Q Do you anticipate being on any predications in the future?

A No, not that I know of.

Q Okay. Are you presently under a doctor's care?

A No.

Q Um, then I'm going to assume that you're going to be able to answer the questions today to the best of your ability, is that fair?

A Yes.

Q Okay. Have you reviewed any documents prior to being here today?

A Like dealing with this case?

Q Yes. Dealing with this case, yes.

A Just what my attorney sent me.

Q Okay. And I don't want to talk with you about the' conversations that you've had with your attorney,

* * *

this may call for legal speculation. But subject to that, or a legal conclusion, but subject to that objection you may answer

A Can you rephrase that for me?

Q (By Ms. Fowler) Yes. Why is it today basically, why was it at the time, and the purpose of us being here today, that you have a complaint against St. John's?

MR. MERRELL: same objection.

A Um, there -- there was a problem, and it wasn't taken care of in my opinion in the right way. And -- because I complained about the problem, I felt like I was retaliated against.

Q And what was -- what is the problem that you're speaking of?

A There was a supervisor that had problems keeping his hands to himself, and he would tell some pretty crude jokes and make crude comments to me and other people.

Q Okay. When you said he had a hard time keeping his hands to himself. Why do you think he was doing that?

A I don't know.

Q When he was telling the rude and the crude jokes, why do you think he was doing that?

MR. MERRELL: Objection. Calls for speculation. You may answer.

A I don't -- I don't know why he was doing it.

Q (By Ms. Fowler) So you stated that you felt like you had a problem with a supervisor keeping his hands to himself, telling crude jokes. Were there any other problems that you had with that particular supervisor?

A. He was degrading to you and other people -- or to me and other people. I mean, he would -- he

would say things that would degrade you to a point where you felt bad. And -

Q And -- go ahead

A And flexing his authority.

Q Why do you think be was flexing his authority?

MR. MERRELL: objection. Calls for speculation. You may answer.

A For instance, you know, you would say, you know, stop whatever you're doing, or whatever he was doing, and be would tap his finger on his name badge and -- and says, "What are you going m do? I am the supervisor." Stuff like that.

Q (By Ms. Fowler) You stated that you felt you were retaliated against: How were you retaliated against?

A Well, I made a complaint, not just me, several people made a complaint and -- to other supervisors, and afterwards that supervisor was still doing his job, which I don't understated it. But I was separated from my partners, the people I worked with everyday and told to do another job, which was fine. But it was painting. We had a paint shop.

Okay. And I would start -- they told me to start down in the basement and work my way upstairs doing door jams and doors. And none of the supervisors could figure out what color of paint

they wanted or where they wanted the to start. They could not work together and figure out what they wanted me to do.

Q Do you think that those actions, though, had anything to do with the fact that you'd brought a complaint?

MR. MERRELL: objection. Calls for speculation. You may answer.

A I personally believe, yes.

Q (By Ms. Fowler) And why is that?

A Because nobody else was asked to do that. And there was a paint shop with guys sitting down in the paint shop.

Q So there wasn't anyone else in projects that painted?

A Be -- well, there was one guy that painted while I was on medical leave. But as soon as I came back, he went back to his partner, and I started painting.

Q And who was that?

A Laney Ingram.

Q And Laney was in projects with you?

A That is correct.

Q You stated you were on medical leave. Why were you on medical leave?

A I had an accident, and I got a concussion and broke some ribs.

Q Did that affect the jobs that you were given?

A Pardon me?

Q Did that affect the jobs that you were given?

A Yes.

Q And why was that?

A You ever had a broken rib?

Q No. But I -- but I'm asking you. I mean, is it -

A You can't lift anything. You can't -- it affects you quite a bit.

Q. Okay. Do you have any knowledge of anything else that was going on at the hospital at the time with reference to the new CEO and - and painting that needed to be done?

A I -- I don't know what you're talking about.

Q Do you -- but you do understand as part of projects you could have been asked to paint?

A That is correct. But the whole: time I was there, and these other employees were there, that very

seldom happened. There's two employees that have been in the project shop for at least ten years.

And very seldom were they ever asked to paint and especially asked to start in basement and work their way up. That is why they had a paint crew to keep on top of that.

Q In addition to painting, were there any other jobs that you felt were degrading that you were asked to do?

A None that I can recall, no. And -- and there was nothing degrading about painting.

Q Okay. Then I'm sorry, I misunderstood you. Then why was it that -- that you felt that you were retaliated against for being asked to paint?

A When you're told to start in the basement and work your up, I said, that sounds like it will take the rest of the year to do. And they said, exactly.

Q And who told you that?

A It was Bob.

Q Bob?

A Hammons.

Q You've also named in your complaint some individual defendants in this case including Lloyd Solar, William Syler, Robert Hammons

Paul Elmore, Jon Swope and Robert Norton. Why is it that you're bringing the complaint against these six individuals?

MR. MERRELL: I object because I think this may call for a legal conclusion. But subject to that objection, you may answer.

A Can you re- -- rephrase that for me?

Q (By Ms. Fowler) The six individuals that you've named in your complaint -

A Yes, ma'am.

Q -- why is it that you've named them in this lawsuit?

MR. MERRELL: same objection. You may answer.

A Because I've been to each and every one of them discussing the problem. When this fast started out, you know, I wasn't looking to try to get anybody fired or whatever. I was just looking to get the problem resolved

Q (By Ms. Fowler) When you say you weren't trying to get anyone fired, who are you referring to?

A Lloyd

Q So is it your testimony that these individuals didn't resolve the problem?

A They did not resolve the problem, no.

Q And why did they not resolve the problem?

MR. MERRELL: objection. Calls for speculation. You may answer.

A Because he continued with his crude jokes, his -- his hands, his touching, his -- you know, whatever the -- what all he was doing to me and other people, he kept doing.

Q And when you say other people, who are the other people -

A Well, they're -

Q -- that he was doing this to?

A My fellow workers.

Q Including who?

A Well, Ali, Laney, Chad. And I never saw anything happen with Jay. I never saw him do anything or say anything negative around Jay.

Q Okay. Is there anyone else that you recall seeing him do these things to besides Ali, Laney, and Chad?

A Well, there's other shops, I mean - I mean, be -- pretty much Lloyd. I mean, he'd go up and make jokes and, you know, grab people. I mean -

Q That you personally witnessed. Is there anyone else that you personally witnessed Lloyd do these things to?

A Uh, I can't remember. There's Jimmy in the electric shop. Uh, and there was -- I can't remember all their names. It's been a while since I've been there. But, I mean, he would make jokes and gestures to a lot of people.

Q When you say gestures, what kind of gestures?

A Just uh, touching, grabbing, Telling his jokes. I mean, that -- that's just how Lloyd was. And he wasn't that way with everybody.

Q And why wasn't he that way with everybody?

A I don't know,

Q So what's you're understanding of why he was acting the way he was acting?

A My understanding?

Q Yes.

MR. MERRELL: Objection. That calls for speculation, but you can answer.

A I don't understand what he was going through or why he was doing what he was. I don't understand any of it.

Q (By Ms. Fowler) Was he -- was he doing this to you because you were a guy?

A I don't -- I don't know.

Q Other than Ali, Laney, Chad, and Jimmy, is there anyone else that you saw Lloyd touch or grab?

A Not that I can recall. I mean, there was -- I'm sure there was. But a lot of times we worked separate from everybody else so -

Q What -- what -- what was your impression of what Lloyd was doing? How did you take it?

A Wrong.

Q In what way?

A Well, what gives him the right to grab me, to rub against me and tell dirty jokes the way he was, and shove rakes and measuring tapes and stuff like that. That's not his job. That's not -- this is my body. I don't have to hear that, and I don't have to feel it or see it.

Q Do you think that he was doing that because be was sexually aroused by you?

A I don't know why he was doing it.

Q Do you think be was trying to sexually arouse you?

MR. MERRELL: objection. I think that calls for speculation. But you can answer if you know.

A I don't know why Lloyd was doing the things he was doing on any of it.

Q Um, did you have -- get any hearsay information that Lloyd had done these gestures or touching and grabbing to other people?

A I have -- no.

Q Okay. Did you ever hear that be -- he did it to someone else that you didn't see him do?

A Yes.

Q And who was that?

A Well, I don't know exactly what this person meant, but when we went to him to complain, Bill Syler, we said -- he said that we've had this problem with Lloyd before, and we will talk to him, and it will be taken ere of. But I don't know what all problems he meant we've had with Lloyd before. He didn't specify. He didn't go into details. He just said we've had this problem with Lloyd before.

Q Okay. What was it about these actions by Lloyd that -- that made you uncomfortable?

A Pardon me?

Q What was it about these actions by Lloyd that made you -- that made you uncomfortable that - that -

A You couldn't -

Q -- about his demeanor that -- that bothered you.

A Well, it made it bard to work. You couldn't think. Whenever he came in the room, you stopped to watch to see what he was going to do. You couldn't -you couldn't concentrate on your job everyday. He -- he invaded my privacy, my body, and then threatened me with his authority. "What are you going to do about it?"

Q Did he threaten you because you were a guy?

A I don't know why he threatened me, ma'am.

Q Okay. So as you're sitting here today, you don't have any understanding of what his motivation was?

A No. Besides to irritate me, no, I don't know.

Q Okay. Do you need to take a break? Are you doing okay?

MS. LONG: I think we can take a break and get these flies out of here.

MS. FOWLER: we've been going for an hour and -

(Break in proceedings)

Q (By Ms. Fowler) I'm going to backtrack a little bit. You went from the yard into projects, correct?

A Correct.

Q And who was your initial supervisor when you went into projects?

A Bob Hammons was my -- the head supervisor of project shop. But Lloyd was who I talked to everyday. Gave me direction.

Q So you were told to -- you were to report to Lloyd?

A Yes, Ma'am.

Q Did you have any information prior to reporting to Lloyd at that time about Lloyd? Did you know anything about him?

A No, I had none.

Q Okay. Had you received any prior information about him harassing anyone?

A None.

Q What were at -- your initial duties when you" started, in projects?

A Um, a lot of times we built-walls and hung sheetrock And laid floor tile and ceiling tile and repaired doors.

Q Could you be asked to go to a floor and fix something that was damaged?

A A lot of times, yes.

Q And how would those come about?

A You would either receive work order. .. A lot of times they handed -- Lloyd would just hand work

42 USC § 2000e-16b

SUBCHAPTER VI--EQUAL EMPLOYMENT OPPORTUNITIES Sec. 2000e-16b. Discriminatory practices prohibited

(a) Practices All personnel actions affecting the Presidential appointees described in section 1219 \1\ of title 2 or the State employees described in section 2000e-16c of this title shall be made free from any discrimination based on— \1\ See References in Text note below.

(1) race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of this title;

(2) age, within the meaning of section 633a of title 29; or (3) disability, within the meaning of section 791 of title 29 and sections 12112 to 12114 of this title.

(b) Remedies The remedies referred to in sections 1219(a)(1) \1\ of title 2 and 2000e-16c(a) of this title—

(1) may include, in the case of a determination that a violation of subsection (a)(1) or (a)(3) of this section has occurred, such remedies as would be appropriate if awarded under sections 2000e- 5(g), 2000e-5(k), and 2000e-16(d) of this title, and such compensatory damages as would be appropriate if awarded under section 1981 or sections 1981a(a) and 1981a(b)(2) of this title;

(2) may include, in the case of a determination that a violation of subsection (a)(2) of this section has occurred, such remedies as would be appropriate if awarded under section 633a(c) of title 29; and

(3) may not include punitive damages.

(Pub. L. 102-166, title III, Sec. 302, Nov. 21, 1991, 105 Stat. 1088; Pub. L. 104-1, title V, Sec. 504(a)(1), Jan. 23,

1995, 109 Stat. 40.) References in Text Section 1219 of title 2, referred to in text, was repealed by Pub. L. 104-331, Sec. 5(a), Oct. 26, 1996, 110 Stat. 4072. Codification Section was formerly classified to section 1202 of Title 2, The Congress. Amendments 1994--Pub. L. 104-1 amended section generally. Prior to amendment, text read as follows: ``All personnel actions affecting employees of the Senate shall be made free from any discrimination based on-- ``(1) race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of this title; ``(2) age, within the meaning of section 633a of title 29; or ``(3) handicap or disability, within the meaning of section 791 of title 29 and sections 12112 to 12114 of this title." Effective Date Section effective Nov. 21, 1991, except as otherwise provided, see section 402 of Pub. L. 102-166, set out as an Effective Date of 1991 Amendment note under section 1981 of this title. Section Referred to in Other Sections This section is referred to in sections 2000e-16a, 2000e-16c of this title; title 2 section 1435.